

Christy D. Joseph (#136785)
Nathan W. Hicks (#236269)
SNELL & WILMER L.L.P.
600 Anton Boulevard, Suite 1400
Costa Mesa, CA 92626-7689
Telephone: (714) 427-7000
Facsimile: (714) 427-7799

Attorneys for Defendant University of
Phoenix, Inc.

UNITED STATES DISTRICT COURT – SOUTHERN DISTRICT OF
CALIFORNIA

CHAD MCKINNEY, an individual,
Plaintiff,

v.

APOLLO GROUP, INC.,
UNIVERSITY OF PHOENIX, a
Corporation, MECHELLE
BONILLA, an Enrollment Manager
at UNIVERSITY OF PHOENIX,
KYAN FLYNN, Director of
Enrollment at UNIVERSITY OF
PHOENIX, APRIL ALCORN, an
Employees Relations Consultant at
UNIVERSITY OF PHOENIX,
CARLYN LINDSTEN, Associate
Director of Enrollment at
UNIVERSITY OF PHOENIX

Defendants

CASE NO. 07-CV-2373 WQH CAB

**DEFENDANT UNIVERSITY OF
PHOENIX INC.'S REPLY TO
PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS
COMPLAINT, OR IN THE
ALTERNATIVE FOR MORE
DEFINITE STATEMENT**

**[FRCP 12(b)(2); 12(b)(5); 12(b)(6);
12(e).]**

Date: May 12, 2008
Time: 11:00 a.m.
Courtroom: 4
Judge: Hon. William Q. Hayes

DATE OF FILING: December 19, 2007

Snell & Wilmer
LLP

LAW OFFICES
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-7689
(714) 427-7000

I.

INTRODUCTION

Plaintiff Chad McKinney's ("McKinney") latest round of post hoc oppositions highlight the very reasons that his complaints against the above-captioned defendants should be dismissed. Nowhere in McKinney's opposition does he allege any substantive facts or provide any cogent legal support. Instead, McKinney supplants stumbling legal conclusions, conjecture and allegory in order to maintain his claims.

Further, McKinney does not deny, and therefore admits, that he has no standing to bring a claim under the Federal False Claims Act. McKinney does not deny that Title VII does not him because he did not allege any actions by the above-captioned defendants that are afforded Title VII protection.¹ McKinney does not deny that he failed to provide any factual support or legal basis for his other five purported causes of action. McKinney does not dispute that Ellen Bowens is an administrative employee for the University of Phoenix, Inc. ("UOP") and not an officer, general manager or designated agent for service of process for Apollo or UOP. McKinney also admits that he did not mail through first-class mail service copies of the summons and complaint to UOP. And finally, McKinney does not argue that the Court should not dismiss his claims with prejudice. As a result, UOP's motion should be granted and McKinney's claims should be dismissed.

II.

MCKINNEY ADMITS THAT HE DID NOT PROPERLY SERVE UOP.

McKinney admits that he did not serve a UOP officer, general manager or designated agent for service of process, but rather attempted substitute service on a UOP administrative employee Ellen Bowens. [Opposition, 2:19-3:3, referring to

¹ McKinney does not bother to allege that any of the defendants' actions were the result of his inclusion in a protected category afforded Title VII protection.

1 Declaration of RT Hansell attached as Ex. C.] Therefore, McKinney attempted to
 2 substitute serve UOP pursuant to California law.² As such, under California law,
 3 substitute service may only be utilized after a “good faith effort at personal service
 4 has been attempted.” Cal. Code Civ. Proc. § 415.20. Further, after attempted
 5 substitute service, a copy of the summons and complaint must be mailed to the
 6 defendant via pre-paid first class mail. *Id.*, *see also Khourie, Crew & Jaeger v.*
 7 *Saebek, Inc.* (1990) 220 Cal. App. 3d 1009, 1015 (even if substitute service is
 8 attempted, a copy of the summons and complaint must be mailed to the
 9 corporation). McKinney made no such good faith effort, and has not provided any
 10 evidence that he attempted to do so. Further, McKinney does not deny that he did
 11 not mail a copy of the summons and complaint to UOP via pre-paid first class mail
 12 as is required.

13 If the defendant challenges the method of service, the burden is on plaintiff to
 14 show that reasonable attempts were made to serve defendant personally before
 15 resorting to substitute service and why personal service could not be effected.
 16 *Evartt v. Superior Court*, 89 Cal. App. 3d 795, 801 (1979). Two or three attempts
 17 to personally serve defendant at a “proper place” ordinarily qualifies as “reasonable
 18 diligence” at attempting personal service. *Espindola v. Nunez*, 199 Cal. App. 3d
 19 1389, 1392 (1988); *Stafford v. Mach*, 64 Cal. App. 4th 1174, 1182 (1998).
 20 Moreover, no copies of the summons and complaint were ever mailed to UOP.
 21 Therefore, UOP was not properly served under either federal or California law and
 22 is not subject to the Court’s jurisdiction. Accordingly, McKinney’s complaint
 23 should be dismissed.

24
 25
 26
 27
 28 ² Indeed, McKinney attempted substitute service of a corporation which is not authorized under federal law.

1 III.

2 **MCKINNEY ADMITS THAT NO LEGAL BASIS EXISTS FOR**
 3 **ANY OF HIS CAUSES OF ACTION.**

4 McKinney does not even bother to provide any legal support for the rest of
 5 his opposition, and instead provides only his opinions and “legal” conclusions.
 6 To that end, McKinney summarily concludes that:

- 7 • “The Complaint does state claims which relief may granted;”
 8 • “The Complaint does set forth a short and plain statement of each claim;”
 9 and
 10 • “The Complaint is not vague, and a more definite statement is not needed.”

11 with no further argument or support.

12 Therefore, McKinney does not deny that he does not have standing to bring a
 13 claim under the Federal False Claims act. McKinney does not deny that Title VII
 14 does not apply to individual defendants and that he did not allege that he belonged
 15 to a protected category afforded Title VII protection. And McKinney does not deny
 16 that he failed to provide any factual support or legal basis for his other five
 17 purported causes of action. Accordingly, McKinney does not provide any claims
 18 upon which relief may be granted, and his claims must fail.

19 IV.

20 **MCKINNEY DOES NOT DISPUTE THAT HIS CLAIMS SHOULD BE**
 21 **DISMISSED WITH PREJUDICE.**

22 McKinney does not dispute that his claims should be dismissed with
 23 prejudice. Accordingly, for the above reasons and the reasons set forth in the
 24 UOP’s moving papers, McKinney’s complaint should be dismissed with prejudice.
 25
 26
 27
 28

V.

CONCLUSION

For the reasons stated above and those set forth in the moving papers, UOP respectfully requests that the Court dismiss McKinney's Complaint against it with prejudice. In the alternative, if the Court finds that it has jurisdiction over UOP and the Court declines to dismiss the Complaint, UOP respectfully requests that the Court require McKinney to file a more definite statement.

Date: May 28, 2008

SNELL & WILMER L.L.P.

By: s/Nathan W. Hicks
Christy Joseph
Nathan W. Hicks
Attorneys for University of
Phoenix, Inc.

\\HICKSN\SWDMS\8814106

Snell & Wilmer
LLP
LAW OFFICES
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-7689
(714) 427-7000

PROOF OF SERVICE**McKinney v. Apollo Group, Inc., et al.
USDC, Southern – Case No. 07-CV-2373**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On May 28, 2008, I served, in the manner indicated below, the foregoing document described as **DEFENDANT UNIVERSITY OF PHOENIX INC.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT, OR IN THE ALTERNATIVE FOR MORE DEFINITE STATEMENT** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Chad McKinney 6266 Madeline Street, Apt. #61 San Diego, CA 92115	Plaintiff, Pro Se Tel: (619) 634-3566 TRACKING # 798949988350
United States District Court Attention: Hon. Judge William Q. Hayes Courtroom 4 940 Front Street, Room 4290 San Diego, CA 92101-8900	Courtesy Copy Tel: (619) 557-5600 TRACKING #798450005988

I am employed in the office of a member of the bar of this court at whose direction the service was made.

☒ BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 28, 2008, at Costa Mesa, California.


Anh Dufour